IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	
MICHAEL and BARBARA DOWNEY,	)	**Case No. 98-20075**
	)	
	)	
Debtors.	)	**MEMORANDUM OF DECISION**
	)	**and ORDER**
	)	
	)	

HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

Louis Garbrecht, Coeur d'Alene, Idaho, and Dan O'Rourke, SOUTHWELL & O'ROURKE, P.S., Spokane, Washington, for Debtors.

Bruce A. Anderson, ELSAESSER JARZABEK ANDERSON MARKS & ELLIOTT, Sandpoint, Idaho, for Louis and Marilyn Palmer.

S. David Swayne, Moscow, Idaho, Trustee.

INTRODUCTION

When the Downeys filed their bankruptcy petition in 1998, notice was issued to creditors that the chapter 7 proceeding was a "no asset" case. In July of 1999, the Trustee asked the Clerk to issue an "asset notice" because he had recovered some $8,000 in tax refunds and had sufficient assets with which to make distribution to creditors. The asset notice was dated and served on July 8, and proof of service of

this notice was filed by the Bankruptcy Noticing Center ("BNC"). This notice required all claims to be filed within 90 days. The Trustee asserts, without contradiction, that this generated a claim bar date of October 6, 1999.

The Palmers, creditors of the estate and successful plaintiffs in a discharge action against the Downeys,[1] failed to timely file a proof of claim. Their claim was submitted on November 24, 1999 simultaneously with a "Motion to Allow Late Filed Proof of Claim." The Downeys and the Trustee resist the motion, and the Trustee has objected to the Palmers' claim.

The BNC's certificate of service reflects mailing of the asset notice to Palmers' counsel at an address which is acknowledged to be the law firm's mailing address. This certificate also reflects service of the notice on the Palmers, and counsel acknowledged the accuracy of the address used for his clients. Nevertheless, the Palmers assert that they never received the asset notice, and their counsel also asserts he also did not receive this notice.

The Palmers' counsel stated at hearing that, when preparing judgment in the adversary proceeding, he recalled that assets might be available for distribution and through investigation at that time concluded not only that a claim could be filed but already should have been. That discovery generated the instant motion.

The Palmers' motion was served on all creditors of the estate. Since the Palmers' claim is substantial, its allowance as timely filed would significantly dilute

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[1] *Palmer v. Downey (In re Downey)*, 242 B.R. 5, 99.4 I.B.C.R. 165 (Bankr. D. Idaho 1999).

recovery by those who complied with the asset notice deadline. The service of the motion thus reaches the parties which would be prejudiced if the motion were granted. No creditors have objected by pleading or by appearance at the scheduled hearing. While this absence of creditor opposition may come from a lack of appreciation of the consequences of allowance of the Palmers' motion and claim, the Court notes the absence of opposition by potentially impacted parties.

DISCUSSION

Three issues are implicated by the motion. The first is whether the protestations of the Palmers and their counsel overcome the presumption of service which arises from the filing of the BNC's certificate of service. The second is whether the failure to timely file the proof of claim can be overlooked through application of the principle of "excusable neglect." The third is whether an informal proof of claim was timely asserted under applicable precedent.[2]

1. Presumption of service

As noted, the Court record contains a certificate of service in proper form which indicates that service was made upon the Palmers and their attorney. The burden the Palmers face in contesting the fact of service has been recently clarified by *In re Ware*, 98.4 I.B.C.R. 130 (Bankr. D. Idaho 1998), which states:

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[2] There is of course a fourth alternative which the Court identified at hearing. The claim here clearly could be allowed as an untimely or tardily filed proof of claim. The distributive provisions of the Code would subordinate payment of this claim to the payment of all timely filed claims. § 726(a)(2), (3). This alternative provides no practical relief to the Palmers inasmuch as the Trustee advises that all available funds would be extinguished with payment of administrative expenses and timely filed unsecured claims.

> A properly executed certificate of mailing creates a presumption of receipt of notice. *Moody v. Bucknum (In re Bucknum)*, 951 F2d 204, 206 (9th Cir. 1991). A party asserting non-receipt has the burden of rebutting the presumption. *Id.* The claimant must present more than a declaration or affidavit stating that notice was not received. As the Ninth Circuit Bankruptcy Appellate Panel has explained:
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> > Where the bankruptcy court record shows a certificate of mailing and a complaining party submits an affidavit declaring notice was not received, the weight of the evidence favors the court's certificate. If a party were permitted to defeat the presumption of receipt of notice resulting from the certificate of mailing by a simple affidavit to the contrary, the scheme of deadlines and bar dates under the Bankruptcy Code would come unraveled. For this reason, an allegation that no notice was received does not, by itself, rebut the presumption of proper notice.
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> *Osborn v. Ricketts (In re Ricketts)*, 80 B.R. 495, 497 (9th Cir. BAP 1987) (citing *In re American Properties,* 30 B.R. 247, 250 (Bankr. D.Kan.1983)). The presumption may only be overcome by clear and convincing evidence. *Moody v. Bucknum (In re Bucknum)*, 951 F.2d 204, 206 (9th Cir. 1991).

98.4 I.B.C.R. at 130-131.

In the present case, the Palmers' affidavit and their counsel's proffer assert only that notice was not received. Under *Ware,* this is insufficient to rebut the presumption of proper notice.

In addition, the presumption that notice was effectively given is supported by the Trustee's representation at hearing that he received the notice from the BNC; by the representation of counsel for the Downeys that not only did he receive the notice but knows that his clients also received the same since they inquired of him as to its import; and by the fact that the Trustee received timely filed claims by other creditors

after the no-asset case was determined to be an asset case and claims were solicited.

While the Court has no reason to question the credibility of Palmers or their counsel when they represent that they did not receive notice, the proper operation of the bankruptcy system requires something more than their mere affirmation of non-receipt in order to set aside the presumption of service. Accordingly, their motion on this score must be denied.

2. Excusable neglect

Ware also found no basis under the Rules upon which to extend the filing deadline or allow the untimely claim under the theory of "excusable neglect." 98.4 I.B.C.R. at 131.

While *Briones v. Rivera Hotel and Casino,* 116 F.3d 379, 381-82 (9th Cir. 1997) generally adopts the excusable neglect standard announced in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership,* 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), there still must be an underlying rule or other recognized basis which grants a litigant the opportunity to assert excusable neglect as a defense. In *Briones*, it was Rule 9024 and Fed.R.Civ.P. 60(b). In *Pioneer*, it was Rule 9006(b)(1).

However, application of that defense to late filed claims in chapter 7, 12 and 13 cases is circumscribed by Rule 9006(b)(3) which allows enlargement of the time under Rule 3002(c) only to the extent and under the conditions stated in that Rule. Rule 3002(c) contains 5 exceptions; none apply here, and none speak to excusable

neglect. *In re Idaho Norland Corp.*, 158 B.R. 497, 497-98, 93 I.B.C.R. 226 (Bankr. D. Idaho 1993); *see also, Ware*, 98.4 I.B.C.R. at 131.

Therefore, whatever equities might attend the Palmers' failure to timely file, under a *Briones* analysis, the Court must find that "excusable neglect" has no application here so as to remedy the late filing of the claim.

3. Informal proof of claim

The doctrine of the "informal proof of claim" (sometimes called the "deemed filed proof of claim") is well established in the Ninth Circuit. *See, Dicker v. Dye (In re Edelman)* 237 B.R. 146, 154-55 (9th Cir. BAP 1999) and cases cited therein. For a timely filed informal proof of claim to exist:

> [T]here must have been presented, within the time limit, by or on behalf of the creditor, some written instrument which brings to the attention of the court the nature and amount of the claim.

237 B.R. at 154, quoting *Perry v. Certificate Holders of Thrift Savings*, 320 F.2d 584, 590 (9th Cir.1963). *See also, County of Napa v. Franciscan Vineyards, Inc. (In re Franciscan Vinyards)*, 597 F.2d 181, 183 (9th Cir. 1979).

In certain circumstances, pleadings filed with the Court have been held to meet this burden provided that they otherwise evidence a demand in a specific amount and reflect assertion of that claim against the estate. *Edelman,* 237 B.R. at 154; *Pizza of Hawaii v. Shakley, Inc. (Matter of Pizza of Hawaii, Inc.*), 761 F.2d 1374 (9th Cir. 1985) (request for stay relief filed in chapter 11 prior to claim bar date and attaching a copy of pre-petition complaint satisfied requirements for informal proof of claim).

This Court has also previously recognized the principle:

> An informal proof of claim "must state an explicit demand showing the nature and amount of the claim against the estate, and evidence an intent to hold the debtor liable." *Anderson-Walker Indus., Inc. v. Lafayette Metals, Inc. (In re Anderson-Walker Indus., Inc.)*, 798 F.2d 1285, 1287 (9th Cir.1986) (citing *In re Sambo's Restaurants, Inc.*, 754 F.2d 811, 815 (9th Cir.1985)). The statement of the debt, together with the intent to hold the estate liable, must appear when the document submitted and the surrounding factual circumstances are "reasonably construed." *Anderson-Walker, supra*, 798 F.2d at 1288.

Rakozy v. Diversified Turnkey Construction Co. (In re Western States Drywall Inc.), 145 B.R. 661, 667-68, 92 I.B.C.R. 186, 190 (Bankr. D. Idaho 1992)

Here, the only written material submitted to the Trustee or Court by the Palmers which allegedly satisfies these several requirements is the adversary complaint seeking denial of discharge and the attachment thereto. In this pleading, the Palmers allege they are owed a sum of $485,000.[3]

The complaint bears a certificate of mailing reflecting that it was served on May 15, 1998, well prior to the claim bar date, upon the Trustee as well as upon the Downeys and their counsel. While the text of the complaint does not assert a monetary demand against the estate or purport to hold the estate liable for that claim, it does recite the basis upon which the Palmers believed that the Downeys were obligated, and asserted the amount of the debt in general terms. That the main thrust of the complaint was that the Downeys made false and misleading statements upon

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[3] Other filings of the Palmers in the adversary proceeding repeat these assertions, but do not materially supplement them for purposes of meeting the requirements for an informal proof of claim, and the Court therefore focuses on the complaint.

their schedules and statements of affairs sufficient for denial of discharge under § 727(a)(4) does not detract from representation that the Downeys owed a substantial obligation to the Palmers.

The Trustee was in this fashion made aware of the fact that the Palmers asserted a claim. There was nothing in the submission to lead the Trustee to conclude that the Palmers would not seek a dividend from the estate, were one possible, even though it was clear from the complaint that the primary goal was § 727 relief.

The requirements set forth in *Edelman* and *Western States Drywall* are met, and the Court concludes that there was an informal proof of claim which was timely. The formal proof of claim of November 24 merely amends it.[4]

ORDER

Based upon the foregoing, the Court GRANTS the motion to allow late filed claim on the basis that the late filed claim amends a prior and timely informal proof of claim. The Trustee's objection to the Palmers' claim is OVERRULED.

Dated this 21st day of January, 2000.

[4] The Trustee or Downeys are free of course to object to the claim on any other legitimate basis; this decision addresses only the timeliness of filing.